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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

F. A. WALDEN,

Plaintiff and Respondent,

v.

J. MICHAEL SCHAEFER,

Defendant and Appellant.

D036907

(Super. Ct. No. 684706)

APPEAL from a judgment of the Superior Court of San Diego County, Sheridan E. Reed, Judge. Affirmed.

Defendant J. Michael Schaefer appeals a judgment for plaintiff F. A. Walden, entered after the court determined Schaefer had defaulted on the last payment due under a conditional settlement agreement. Schaefer contends reversal is required for a variety of reasons, including that he was excused from making the last payment on time because the parties were negotiating its amount. We affirm the judgment.



## BACKGROUND

In 1993, Schaefer executed a \$100,000 promissory note in favor of Walden to secure a loan. Walden later filed a complaint against Schaefer related to the note. In October 1995 the parties entered into a written conditional settlement agreement. The agreement provides:

"Agreed total judgment on default	\$122,000.00
"Agreed amortized total	107,000.00
"Agreed payoff total	100,000.00

"IT IS AGREED that Schaefer will pay \$2,500.00 or more per month on the first day of each month commencing November 1, 1995 for as many months as it takes to amortize the amount of \$107,000.00 with interest at ten percent . . . per annum. If any payment is missed (not received by [Walden] within ten days of the date thereof), judgment shall be entered against Schaefer in the amount of \$122,000.00 less the aggregate of principal paid under this agreement to the date of judgment."

Schaefer did not tender the last payment, due on January 1, 2000, until the following month. Walden moved the court for an order vacating the earlier dismissal of this action, and for judgment against Schaefer based on his default in making the last payment. The court vacated the dismissal and entered a \$22,749.91 judgment for Walden, consisting of \$122,000 less Schaefer's payments under the note.

## DISCUSSION

Schaefer contends he is entitled to a presumption of performance under the conditional settlement agreement. He cites the following maxim of jurisprudence: "That which ought to have been done is to be regarded as done, in favor of him to whom, and



against him from whom, performance is due." (Civ. Code, § 3529.) Schaefer, however, concedes he made the January 2000 payment late.

Schaefer asserts he was excused from making the January 2000 payment on time because he could not ascertain the amount due. He states that "'[w]hen the amount due is undetermined and cannot be fixed without an accounting, it seems that the case is not one in which a tender can be made before a determination of the amount due.'" <sup>1</sup> However, when the parties entered into the conditional settlement agreement, Walden provided Schaefer with an amortization schedule showing the amount of the final payment, and Walden's counsel sent Schaefer a letter confirming the amount was \$808.44. Schaefer's knowledge of the amount of the last payment is demonstrated by his tender of a check, albeit late, for \$808.44.<sup>2</sup>

Similarly unavailing is Schaefer's claim he was excused from making the January 2000 payment on time because the parties were negotiating the final amount due. Walden's counsel filed a declaration stating that "'[n]egotiations for settlement did not begin until at least my phone call to Schaefer after receipt of [Walden's] January 17 [2000] letter [advising he had not received the January 2000 payment]. Our side considered that the agreement was in default and that we were simply negotiating the amount of penalty.'" In any event, Schaefer cites no authority for the proposition that

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<sup>1</sup> Schaefer attributes this quote to *Miller v. Cox* (1892) 96 Cal. 339, or *Easterbrook v. Farquharson* (1895) 110 Cal. 311. However, neither case contains the quote.



negotiations excuse timely payment under a settlement agreement. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved of on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693.)

We are also unpersuaded by Schaefer's contention that his "substantial performance" of the settlement agreement and the timely making of prior payments excused him from making the last payment on time. The "substantial performance" doctrine applies chiefly in the construction industry, and allows a contractor to pursue a contract action when there has been less than complete performance. "What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for. [Citations.]" (1 Witkin, Summary of Cal. Law (9th ed. 1997) Contracts, § 762, p. 690.) Schaefer cites no authority suggesting the doctrine applies to an installment payment agreement.

The court's factual findings are supported by substantial evidence, and there are no legal grounds for reversal.

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<sup>2</sup> In his opening brief, Schaefer states he tendered a payment of \$808.14. In declarations, however, Walden's counsel stated that Schaeffer tendered a check for \$808.44. Even if there were a discrepancy, it was minor.



DISPOSITION

The judgment is affirmed. Walden is awarded costs on appeal.

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McCONNELL, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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HALLER, J.